2-11-1976

Robert Spencer v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-1077

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1077

ROBERT SPENCER — APPELLANT

VS. — APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE FRANK R. GOAD, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a copy of this Brief has been mailed, postage prepaid, to the Honorable Frank R. Goad, Judge, Simpson Circuit Court, Simpson County Courthouse, Franklin, Kentucky 42134; Honorable Robert E. Taylor, Commonwealth's Attorney, 122 W. Kentucky Avenue, Franklin, Kentucky 42134; and Honorable Jack Emory Farley, Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 by delivering a copy to Jim Early, Assistant Public Defender, Counsel for Appellant, on this the 11th day of February, 1976.

Donald C. Morris
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MAY IT PLEASE THE COURT:

STATEMENT OF QUESTION PRESENTED

WHETHER THE COMMONWEALTH ATTORNEY USED IMPROPER AND INFLAMMATORY COMMENTS IN HIS CLOSING ARGUMENT; FURTHERMORE WHETHER ERROR, IF ANY, WAS WAIVED FOR FAILURE TO OBJECT AND WHETHER ERROR, IF ANY, WAS NON-PREJUDICIAL HARMLESS ERROR.

COUNTERSTATEMENT OF THE CASE

Appellee accepts appellant's statement of the case. Any facts germane to the issue raised will be referred to where applicable in the argument of appellee's brief as hereinafter set forth. The Transcript of the Record and Transcript of the Evidence will be hereinafter referred to as T.R. and T.E. respectively.

ARGUMENT
I

THE COMMONWEALTH ATTORNEY DID NOT USE IMPROPER AND INFLAMMATORY COMMENTS IN HIS CLOSING ARGUMENT; FURTHERMORE, ERROR, IF ANY, WAS WAIVED FOR FAILURE TO OBJECT AND ERROR, IF ANY, WAS NON-PREJUDICIAL HARMLESS ERROR.

Appellant's contention that three specific statements found in the Commonwealth Attorney's closing argument were an improper and prejudicial appeal to the passions and prejudices of the jury is devoid of merit. The record reveals that not only were those comments within the permissible leeway of a prosecuting attorney, but that error, if any, was waived for lack of an objection. Furthermore, even if an objection had been made to comments complained of, error, if any, was harmless.

It is a fundamental principle of criminal law that a prosecuting attorney may express his opinion of a defendant's guilt, Koonce v. Commonwealth, Ky., 452 S.W.2d 822 (1970). Without stating the content of the argument, this Court said in Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971) that:

> ". . . [A] Commonwealth Attorney is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make a reasonable argument in response to matters brought up by the defendant..." at 959.

The complained of statement of the prosecutor:

> "[N]ow you have no right in this Commonwealth to kill anyone because if we had that right to kill someone or to shoot someone just because we were mad at them or disliked them I guess half of the people would be gone and all the little kids would have knocked off about half of the teachers at one time or the other." (T.E., 117).

was a "reasonable comment" on the evidence, and is well within the prosecutor's leeway. Kinnett v. Commonwealth, Ky., 408 S.W.2d 417 (1966), cert. den. 387 U.S. 924, 87 S.Ct. 2042, 18 L.Ed.2d 980 (1967). The above quoted comment of the Commonwealth's Attorney was merely an analogy by which the prosecutor argued his theory of the case and commented on the evidence that had been presented to the jury.

Appellant also complains of that portion of the closing argument wherein the Commonwealth's Attorney stated:

> "This is your community and you can let this man loose to shoot the next guy that he doesn't like in the back, without warning, without a word said. The testimony was that he didn't say a thing. He didn't say get away from me, stay back, nothing. You can let this go on in the community or you can stop it. There have been enough shootings around here. Now the sentence you can give him is two to twenty-one years. I am asking you to return a verdict and give him ten years, set an example. This has got to stop. . ." (T.E., 118).

It is universally accepted that a prosecuting attorney may emphasize the growing threat of crime in the community and plead for the imposition of severe penalties as a method of stopping that growth. Greer v. Commonwealth, Ky., 455 S.W.2d 555 (1970); Hamilton v. Commonwealth, Ky., 401 S.W.2d 80 (1966), cert. den. 385 U.S. 1014, 87 S.Ct. 728, 17 L.Ed.2d 551 (1967), and Harness v. Commonwealth, Ky., 475 S.W.2d 485 (1972), cert. den. 409 U.S. 844. It is also permissible for a prosecuting attorney to plead with the jury to do their duty in order to stop the threat of growing crime rate in the community, Meyer v. Commonwealth, Ky., 472 S.W.2d 479 (1971), cert. den. 406 U.S.

919, as was done in the instant case. In Wilson v. Commonwealth, Ky., 411 S.W.2d 33 (1967), this Court held that where a prosecuting attorney's closing argument amounts to nothing more than general denunciation of crime in the community it is permissible. In Shepherd v. Commonwealth, 236 Ky. 290, 33 S.W.2d 4 (1930), a murder trial, the closing argument of the Commonwealth Attorney pleaded for a conviction in order to take Butler County out of the headlines as a community where crime was rampant. In affirming the conviction, the court stated:

> "In the zeal of advocacy, heated remarks are not unusual, and some allowance must be made for the common sense and fair judgment of the jurors," at 6.

The closing argument of the Commonwealth's Attorney in the instant case was well within the permissible leeway of proper argument.

Appellant also complains of the statement of the Commonwealth's Attorney that attacked the credibility of appellant's witness:

> ". . . George Williams. You all know who George Williams is. He runs that place over there that we closed up known as Williams Cafe. It is the source of all kinds of problems in the community and you know the reputation of the business and the people who run it. I wouldn't believe them from here to you...." (T.E., 116).

To establish his theory of justification, appellant offered the testimony of George Williams to establish the fact that Mr. Savage had pulled a gun on appellant in his [George William's] place of business on an earlier occasion (T.E., 98). Appellant

was obviously vouching for the veracity of this witness when he was called as a witness, and it was therefore entirely proper for the Commonwealth's Attorney to comment upon that witness's credibility by commenting on a fact which that witness's testimony revealed.

In Spirko v. Commonwealth, Ky., 480 S.W.2d 169 (1972) the Commonwealth Attorney made a general characterization of the "defendant" as a nefarious character and a criminal element. In affirming the conviction the court held that such a characterization of "defendant" was within the latitude allowed in final argument. In Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974) the Commonwealth Attorney referred to the "defendants" as "jerks" and "two little scums." The court held that these contemptuous appellations, designed to encourage the jury to impose a stiff penalty, did not require a reversal of rape and armed robbery convictions.

The contemptuous appellations of the prosecutor's closing argument in the instant case were addressed to appellant's witness, George Williams, rather than to appellant. Thus the comments in the instant case were even less offensive than were the comments in Spirko and Ferguson, wherein the respective convictions were affirmed.

Appellee further contends that even if the closing argument was improper, any error was not preserved for appellate review by a proper and timely objection. The record is devoid of any objection to the closing argument of the Commonwealth's

Attorney (T.E., 115-118), thus this issue may not be considered on appeal. RCr 9.22.

A wealth of authority supports the unassailable rule that where no objection is made to the prosecutor's closing argument and hence no opportunity offered the trial judge to correct any impropriety, the question is not properly preserved for appellate review. Magruder v. Commonwealth, Ky., 281 S.W.2d 716 (1955); Martin v. Commonwealth, Ky., 477 S.W.2d 506 (1972); Bell v. Commonwealth, Ky., 480 S.W.2d 163 (1972); Crain v. Commonwealth, Ky., 484 S.W.2d 839 (1972); Hopper v. Commonwealth, Ky., 516 S.W.2d 855 (1974); and Glasscock v. Commonwealth, Ky., 307 S.W.2d 188 (1957). In Ferguson v. Commonwealth, supra, this Court held that any impropriety in an argument, not objected to, would not be ground for reversal unless prejudice was so apparent and so great as to result in a manifest injustice. The court could find no manifest injustice in that case where the jury did not impose the maximum sentence.

Appellant admits that the complained of closing argument was not objected to but contends that the alleged error was so prejudicial that the conviction should be reversed anyway. In Minor v. Commonwealth, Ky., 478 S.W.2d 716 (1971), cert. den. 409 U.S. 1064, 93 S.Ct. 563, 34 L.Ed.2d 517 (1972), cert. den. 415 U.S. 929, 94 S.Ct. 1439, 39 L.Ed.2d 487 (1974), in holding that a prosecutor's comment on a co-defendant's failure to testify for the defendant was not so prejudicial as to require a reversal absent an objection, this Court stated:

> "It is only in cases where the judgment of conviction imposes the death penalty that this court will abrogate its well e stablished rule of procedure and review questions that have not been previously preserved for appellate review." at 717.

Certainly the ten year sentence of the instant appellant does not approach the magnitude of the capital punishment imposed in Minor; thus the closing argument of the instant case likewise is not so prejudicial as to require a reversal absent an objection.

In Rigsby v. Commonwealth, Ky., 495 S.W.2d 795 (1973) the court held that where there is overwhelming evidence of appellant's guilt and the comments of a prosecutor do not even remotely affect the outcome of a trial, any error is not prejudicial. In view of the weight of the evidence and the fact that the jury did not impose the maximum sentence, error, if any, was non-prejudicial. Anderson v. Commonwealth, Ky., 500 S.W.2d 76 (1973) and Ferguson v. Commonwealth, supra.

In Webb v. Commonwealth, Ky., 451 S.W.2d 397 (1970), it was held that "only where it clearly appears that the argument has gone beyond bounds necessary to fasten guilt and has taken undue advantage of the accused [will the court] reverse on the ground of improper argument." at 398, 399. The court found that certain of the prosecutor's remarks were improper, but affirmed the conviction since it was inconceivable that the remarks affected the verdict. If, as here, a comment even if improper, does not in view of all the evidence affect the result, and especially where, as here, the sentence imposed approaches the minimum rather than the maximum, the impropriety is held non-

prejudicial. In accord is Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969). Such nonprejudicial error which does not affect the verdict is not ground for reversal of appellant's conviction. RCr 9.24.

CONCLUSION

For the foregoing reasons appellee respectfully requests this Court to affirm the judgment of the Simpson Circuit Court.

Respectfully submitted,

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